

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

PUBLIC UTILITIES
COMMISSION

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FILED

In the Matter of the Application)

of)

WAI'OLA O MOLOKA'I, INC.)

) Docket No. 2009-0049

)
) For review and approval of rate
) increases; revised rate schedules; and
) revised rules.
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**MEMORANDUM IN OPPOSITION TO
STAND FOR WATER'S MOTION TO INTERVENE**

and

CERTIFICATE OF SERVICE

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**MEMORANDUM IN OPPOSITION TO
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I. INTRODUCTION AND SUMMARY OF ARGUMENTS

Pursuant to Hawaii Administrative Rules ("HAR") § 6-61-41(c), WAI'OLA O MOLOKA'I, INC. ("Wai'ola"), a Hawaii corporation, by and through its attorneys, Morihara Lau & Fong LLP, respectfully submits this Memorandum in Opposition to STAND FOR WATER'S ("SFW" or "Movant") Motion to Intervene, filed on September 14, 2009 ("Motion to Intervene").¹

Wai'ola opposes the Motion to Intervene on the grounds that SFW has failed to satisfy the intervention requirements set forth in HAR § 6-61-55, and that the

¹ HAR § 6-61-41(c) provides, in relevant part: "An opposing party may serve and file counter affidavits and a written statement of reasons in opposition to the motion and of the authorities relied upon not later than five days after being served the motion." HAR § 6-61-41(c) (emphasis added). HAR § 6-61-22 states, in relevant part: "When the prescribed time is less than seven days, Saturdays, Sundays, and holidays within the designated period shall be excluded in the computation." HAR § 6-61-22 (emphasis added). HAR § 6-61-21(e) further adds that "[w]hen ever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other document upon the party and the notice or document is served upon the party by mail, two days shall be added to the prescribed period." HAR § 6-61-21(e) (emphasis added). SFW's Certificate of Service indicates that the Motion to Intervene was served upon Wai'ola by mail on September 14, 2009. Thus, in light of this service date, Wai'ola asserts that its memorandum in opposition is timely, pursuant to HAR §§ 6-61-22 and 6-61-41.

allegations raised in SFW's Motion to Intervene are not reasonably pertinent to the ratemaking proceeding and unreasonably broaden the issues already presented, contrary to HAR §§ 6-6-55(d) and (b). Specifically, Wai`ola contends that any interests that SFW allegedly has regarding Wai`ola's amended application and requests in the subject docket are not special and unique and are adequately and sufficiently represented by the Division of Consumer Advocacy ("Consumer Advocate"), who is statutorily required to represent and advance the interests of all consumers. In addition, while SFW has not specifically identified all of its members, it appears by its own admission that several, if not many, are not even customers of the utility. Further, SFW has not demonstrated or provided any reliable evidence that its intervention as a party (a) would contribute in any significant or material way to the development of a sound record regarding the reasonableness of Wai`ola's proposed rate increase or (b) would not unduly delay the proceedings or unreasonably broaden the issues presented in this docket. In fact, Wai`ola contends that SFW's allegations and statements made in its Motion to Intervene clearly indicate that its participation as a party or intervenor would unduly delay the proceedings and unreasonably broaden the pertinent ratemaking issues to be decided in this docket.

For these reasons and those set forth more fully herein, Wai`ola respectfully requests that the Commission deny SFW's Motion to Intervene.

II. PROCEDURAL BACKGROUND

On June 29, 2009, Wai`ola filed its Amended Application seeking Commission review and approval of rate changes and increases, revised rate schedules and rules, and other rate making matters as described therein ("General Rate Case

Application"). Among other things, Wai`ola is seeking to: (1) increase its rates and charges for its water service; (2) establish an Automatic Power Cost Adjustment Clause, which permits adjustments for electric costs during the year; and (3) amend Rule 20 of its Rules and Regulations to increase its reconnection charge.

On September 3, 2009, pursuant to HRS §§ 269-12 and 269-16, the Commission held a public hearing regarding Wai`ola's General Rate Case Application at the Mitchell Pauole Center Conference Room on the island of Molokai.

On September 14, 2009, SFW filed its Motion to Intervene, in which it seeks to intervene and become a party to this docket.

III. DISCUSSION

Wai`ola contends that SFW's Motion to Intervene should be denied for failure to meet the requirements for intervention set forth in HAR § 6-61-55.

It is well-established that intervention as a party in a Commission proceeding "is not a matter of right but is a matter resting within the sound discretion of the [C]ommission." See In re Application of Hawaii Elec. Co., Ltd., 56 Haw. 260, 262, 535 P.2d 1102, 1104 (1975) ("In re HECO"); see also In re Application of KRWC Corporation, dba Kohala Ranch Water Co., Docket No. 2008-0283, Order (February 27, 2009); In re Application of Paradise Merger Sub, Inc., et. al., Docket No. 04-0140, Order No. 21226 (August 6, 2004); and In re Megumi Matsumoto dba Big Blue Hawaii, Docket No. 05-0134, Order No. 22122 (November 16, 2005).

HAR § 6-61-55 sets forth the requirements for intervention. HAR § 6-61-55(a) states, in relevant part, that "[a] person may make an application to intervene . . . by filing a timely written motion . . . stating the facts and reasons for the

proposed intervention and the position and interest of the [movant]." HAR § 6-61-55(b) further states:

- (b) The motion shall make reference to:
 - (1) The nature of the [movant's] statutory or other right to participate in the hearing;
 - (2) The nature and extent of the [movant's] property, financial, and other interest in the pending matter;
 - (3) The effect of the pending order as to the [movant's] interest;
 - (4) The other means available whereby the [movant's] interest may be protected;
 - (5) The extent to which the [movant's] interest will not be represented by existing parties;
 - (6) The extent to which the [movant's] participation can assist in the development of a sound record;
 - (7) The extent to which the [movant's] participation will broaden the issues or delay the proceeding;
 - (8) The extent to which the [movant's] interest in the proceeding differs from that of the general public; and
 - (9) Whether the [movant's] position is in support of or in opposition to the relief sought.

HAR § 6-61-55(b). In addition to satisfying all of the requirements listed above, HAR § 6-61-55(d) provides further that "[i]ntervention shall not be granted except on allegations which are reasonably pertinent to and do not unreasonably broaden the issues already presented." HAR § 6-61-55(d) (emphasis added); see also In re HECO, 56 Haw. at 262, 535 P.2d at 1104.

Further still, the Commission needs to insure "the just, speedy and inexpensive determination of every proceeding," which is the purpose of the Commission's Rules of Practice and Procedure as set forth in HAR § 6-61-1.²

² HAR § 6-61-1 (stating, in relevant part, that the rules should be "liberally construed to secure the just, speedy, and inexpensive determination of every proceeding").

A. SFW Fails to Satisfy the Majority of the Requirements to Establish Intervention Provided in HAR § 6-61-55(b).

1. SFW Fails to Allege a Statutory or Other Right to Participate in the Hearing.

HAR § 6-61-55(b)(1) requires SFW to reference the "nature of the [movant's] statutory or other right to participate in the hearing[.]" SFW makes no mention of a statutory or other right to participate and therefore fails to satisfy this legal requirement.

2. SFW Incorrectly Contends That the Ratemaking Proceeding is the Only Forum to Consider Alleged Water Problems.

HAR § 6-61-55(b)(4) requires SFW to reference the "other means available whereby the [movant's] interest may be protected[.]"

The issues involved in a general rate case proceeding include, for example, whether: (1) the proposed rate increase is reasonable; (2) the proposed rates and charges are just and reasonable; (3) the projected operating expenses for the test year are reasonable; (4) the revenue forecasts for the test year are reasonable; (5) the projected rate base for the test year is reasonable; (6) the properties included in the rate base are used or useful for public utility purposes; and (7) the rate of return requested is fair. See, e.g., In re Application of Laie Water Co., Inc., Docket No. 2006-0502, Stipulated Procedural Order No. 23375 (April 19, 2009); In re Application of Waimea Wastewater Co., Inc., Docket No. 2008-0261, Stipulated Procedural Order (January 12, 2009); In re Application of KRWCo Corporation, dba Kohala Ranch Water Co., Docket No. 2008-0283, Stipulated Procedural Order (February 11, 2009).

SFW contends that the ratemaking proceeding is the only forum to consider its alleged water problems (e.g., concerns about water quality, concerns about

the condition of the water system, concerns relating to water permits, and concerns about Wai'ola and its parent company's (Molokai Properties Limited) reliability). As evidenced by the types of issues germane to a ratemaking proceeding referenced above, SFW's issues are outside the scope of such a proceeding and would not add measurably or constructively to the instant ratemaking proceeding.

Denial of SFW's request for intervention does not preclude the Commission from considering SFW's issues of concern. The Commission has the authority to open a separate docket to explore issues such as a utility's fitness and reliability. For example, the Commission typically reviews financial "fitness" of a utility in connection with, among other things, the issuance of a certificate of public convenience and necessity (CPCN) or the sale or transfer of utility assets and/or operations and not as part of a ratemaking proceeding. See, e.g., In re Application of Mauna Lani STP, Inc., Docket No. 05-0229, Decision and Order No. 22299 (February 28, 2006). Further, SFW has itself identified another proceeding, Department of Health v. Molokai Public Utilities, et. al., Docket No. 08-SDW-EO-01, in which certain of SFW's concerns were addressed.³

Moreover, as discussed further below, allowing SFW to participate and raise issues or allegations regarding its alleged non-ratemaking related interests that could be the subject matter of other dockets or proceedings would unreasonably broaden the issues, unduly delay the proceeding, and deter the Commission from ensuring the "just, speedy and inexpensive determination" of this proceeding.⁴

³ See Motion to Intervene at 5.

⁴ See HRS § 6-61-1; see also HRS § 269-16(d), which states, in relevant part, that the Commission shall "make every effort to complete its deliberations and issue its decision as expeditiously as possible[.]"

By failing to recognize that a ratemaking proceeding is not the appropriate forum to consider issues unrelated to rate determination, and that the Commission and other agencies may, in their discretion, open other dockets to explore issues such as health and safety, water quality and a utility's viability, SFW failed to satisfy HAR § 6-61-55(b)(4) as there are other means available whereby SFW's interests may be protected.

3. **SFW Fails to Establish That Its Interests Will Not Be Represented By Existing Parties.**

HAR § 6-61-55(b)(5) requires SFW to reference the "extent to which the [movant's] interest will not be represented by existing parties[.]"

Pursuant to HRS § 269-51, the Consumer Advocate is statutorily mandated to "represent, protect, and advance the interest of all consumers, including small businesses, of utility services." HRS § 269-51 (emphasis added). Further, HRS § 269-54(b)(7) provides the Consumer Advocate with the express authority to "[r]epresent the interests of consumers of utility services before any state or federal agency or instrumentality having jurisdiction over matters which affect those interests."

Further, the Commission has consistently held that the Consumer Advocate appropriately advances the interests of all consumers. See, e.g., In re Molokai Public Utilities, Inc., et. al., Docket No. 2008-0115, Order (August 8, 2008) ("Docket No. 2008-0115"); In re Application of Hawaiian Electric Co., Inc., Docket No. 2006-0386, Order No. 23366 (April 13, 2007); In re Hawaiian Electric Co., Inc., et. al., Docket No. 2006-0431, Order No. 23097 (December 1, 2006) ("Order No. 23097"); In re Application of Molokai Public Utilities, Inc., Docket No. 02-0371, Order No. 19955 (January 14, 2003).

SFW claims, without further elaboration, that “the Consumer Advocate will be focused on determining whether the proposed rates and charges are adequately justified by the utility . . . [so it will not] address issues regarding health and safety, water quality, or the legality and reliability of the system.”⁵ As discussed above, these interests are not relevant for ratemaking purposes and outside the scope of this ratemaking proceeding.

The Consumer Advocate’s statutory duties clearly extend to all consumers in this proceeding, including SFW. SFW has not shown any interest that is distinct or unique from consumers’ interests, as all of Wai’ola’s customers stand to be financially impacted by the proposed rate increase. Under the circumstances, the Consumer Advocate, through its statutory mandate and lack of any financial self-interest, is effectively the party in the best position to balance the interests of the various customer classes (i.e., private and public customers) in a manner that is fair, just, reasonable, and in the public’s best interest.

Accordingly, SFW has failed to show that its interests will not be represented by existing parties, specifically the Consumer Advocate, in violation of HAR § 6-61-55(b)(5).

4. **SFW Fails to Show How Its Participation Can Assist in the Development of the Record, Would Not Unreasonably Broaden the Issues Already Presented, and Would Not Unduly Delay the Proceedings.**

HAR §§ 6-61-55(b)(6) and (7) require SFW to show how its “participation can assist in the development of a sound record” and whether its “participation will broaden the issues or delay the proceeding[.]” As indicated above, HAR § 6-61-55(d)

⁵ Motion to Intervene at 6.

provides further that “[i]ntervention shall not be granted except on allegations which are reasonably pertinent to and do not unreasonably broaden the issues already presented.” HAR § 6-61-55(d) (emphasis added); see also In re HECO, 56 Haw. at 262, 535 P.2d at 1104.

SFW claims that its members have “intimate knowledge of MPL’s water systems and business practices . . . [that] will be extremely valuable in guiding discovery, analyzing data, and cross-examining the utility.”⁶ However, SFW has not elaborated further on how its participation would assist the Commission in the development of a sound record regarding SFW’s revenues, expenses, and/or other general ratemaking issues. The issues identified by SFW – health and safety, water quality, and the legality and reliability of the water system - are not issues that are reasonably pertinent to the rate case. See HAR § 6-61-55(d). Further, SFW has not shown any specialized interest or knowledge that the Consumer Advocate does not itself have or could not obtain through discovery with Wai’ola. SFW’s assertion that it can assist the Commission in the development of the record, therefore, is without merit.

Consistent with the above, Wai’ola contends that SFW has also failed to substantiate how its participation will avoid unreasonably broadening the issues in this case. As noted above, the general rate case issues in this proceeding involve the costs and revenues required for Wai’ola to provide water service to its customers. SFW’s stated concerns regarding health and safety, water quality, and the legality and reliability of the system are issues that are irrelevant to this ratemaking proceeding or are more properly addressed in other dockets or proceedings. Therefore, such an

⁶ Id. at 6.

expansion of the issues beyond general ratemaking issues would unduly broaden and/or confuse the issues and cause potential delays.

Accordingly, Wai'ola contends that the Commission should not consider SFW's unsubstantiated allegations and/or factual representations, and should prohibit SFW from utilizing the intervention process to unreasonably broaden the ratemaking issues already presented and to unduly delay the proceedings in violation of HAR §§ 6-61-55(b)(6) and (7) and 6-61-55(d).

5. SFW Fails to Distinguish Its Interests From That of the General Public.

Pursuant to HAR § 6-61-55(b)(8), SFW must establish "the extent to which [its] interest in the proceeding differs from that of the general public." SFW claims that its interests are different from the public at large, but fails to substantiate this assertion. Thus, SFW fails to satisfy HAR § 6-61-55(b)(8).

B. Certain of SFW's Members Lack the Requisite Standing to Intervene.

SFW contends that it is an unincorporated Hawai'i association,⁷ whose membership is composed of water "ratepayers from all of the communities served by these two utilities."⁸ SFW has not provided a list of all of its members so there is no way to verify that SFW is indeed composed of Wai'ola water ratepayers. Further, SFW has admitted that its membership includes "non-ratepayers who rely on the same water

⁷ Pursuant to a review of the State of Hawai'i, Department of Commerce and Consumer Affairs, Business Registration Division's records, SFW is not a registered association or organization in Hawai'i, nor is "Stand For Water" a registered trade name.

⁸ Motion to Intervene at 2.

supply infrastructure[.]”⁹ Given that SFW has not explained or demonstrated how these non-customers have a financial or property interest that will be impacted by this ratemaking proceeding, certain of SFW’s members clearly lack standing to intervene in this proceeding. See, e.g., In re Laie Water Co., Inc., Docket No. 2006-0502, Order No. 23446 (May 18, 2007).

C. Timothy Brunnert Should Not be Allowed to Represent Other Alleged Customers/Ratepayers As a Class or Group.

Finally, Timothy Brunnert claims to be acting on behalf of SFW in signing SFW’s Motion to Intervene. However, Mr. Brunnert fails to provide any factual support or verification (e.g., affidavit) to identify the members of SFW, to establish the SFW members as Wai’ola customers/ratepayers, and to establish that he has authorization to represent SFW’s interests as a group. HAR § 6-61-41(b) states, in relevant part: “If a [Motion to Intervene or Participate] requires the [Commission’s] consideration of facts not appearing of record, it shall be supported by an affidavit or affidavits.” Mr. Brunnert has failed to substantiate that he can speak on behalf of other similar ratepayers, specifically SFW. Thus, for purposes of this Motion to Intervene, the Commission should treat Mr. Brunnert as solely an individual customer/ratepayer rather than an authorized representative of SFW.¹⁰ Even assuming, *arguendo*, that Mr. Brunnert demonstrates the requisite authority to represent SFW, as discussed at length above, SFW has still failed to satisfy the intervention requirements set forth in HAR § 6-61-55.

⁹ Id. Further, assuming that the potential witnesses identified in SFW’s Motion to Intervene are members of SFW, Wai’ola has reason to believe that Ray Tensfeldt, Glenn Teves and Taryn Waros are not customers of Wai’ola. Therefore, these individuals do not have the financial interest asserted by SFW and do not have standing to intervene in this matter.

¹⁰ See also In re MECO, Docket No. 94-0345, Order No. 13964 (June 20, 1995) at 5 (stating, in relevant part, that even if the individual ratepayer were allowed to intervene or participate, the individual ratepayer could not speak on behalf of other similar ratepayers).

IV. CONCLUSION

In sum, SFW's Motion to Intervene fails to meet the requirements set forth in HAR §§ 6-61-55(b)(1), (4), (5), (6), (7) and (8) and should be denied. As emphasized above, SFW has failed to state the nature of its right to participate in the hearing and has not presented sufficient evidence establishing that its interests are distinct from the interests statutorily represented by the Consumer Advocate. The concerns it states relating to its interests are either not reasonably pertinent to the resolution of the *general rate case issues involved in this ratemaking proceeding or are those that the Consumer Advocate historically reviews and examines, pursuant to its obligations imposed under HRS § 269-54.*

Therefore, Wai'ola contends that the Consumer Advocate, which has been statutorily charged with representing all consumer interests before the Commission, *will adequately represent SFW's interests and develop a sound record on the general rate case issues in this proceeding.* There are clearly other means available whereby SFW's alleged interests can be protected, and it has failed to distinguish itself from other customers' interests that are generally represented as a whole by the Consumer Advocate. Moreover, finding that the Consumer Advocate will adequately represent the interests of Wai'ola's customers in this proceeding, including SFW, is consistent with the "just, speedy and inexpensive determination of every proceeding" as established in HAR § 6-61-55(d).

Based on the foregoing reasons and the authorities cited above, SFW's Motion to Intervene should be denied. Accordingly, Wai'ola respectfully requests that the Commission issue an order denying SFW's Motion to Intervene based upon SFW's failure to satisfy the bases for intervention provided in HAR § 6-61-55.

DATED: Honolulu, Hawaii, September 21, 2009.

A handwritten signature in black ink, appearing to read "Michael H. Lau", written over a horizontal line.

Michael H. Lau
Yvonne Y. Izu
Dana O. Viola
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were duly served on the following party, by having said copies delivered as set forth below:

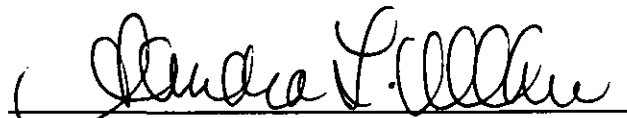
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1 COPY
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DATED: Honolulu, Hawaii, September 21, 2009.

A handwritten signature in black ink, appearing to read "Michael H. Lau", is written over a horizontal line.

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